No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL., PETITIONERS

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, IDAHO, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, WISCONSIN, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, AND PAUL R. LEPAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Alabama, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin, the Commonwealth of Kentucky, and the Governor of Maine.[1] Approximately 29 states, including many of the amici States, have laws requiring a physician to provide certain information to a patient when obtaining informed consent to perform an abortion procedure.[2] The Ninth Circuit treated these types of laws as similar to the California law at issue in this case, but the amici States write to clarify that these laws are significantly different in dispositive ways.

Planned Parenthood of Southeastern Pennsylvania v. Casey held that state laws requiring certain information as part of obtaining a patient's informed

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties received timely notice of filing and consented to the filing of this brief. *See* Sup. Ct. R. 37.

[2] *See* Ala. Code § 26-23A-4; Ariz. Rev. Stat. § 36-2153; Ark. Code § 20-16-1703; Fla. Stat. § 390.0111(3); Ga. Code § 31-9A-3; Idaho Code § 18-609; Ind. Code § 16-34-2-1.1; Iowa Code § 146A.1; Kan. Stat. § 65-6709; Ky. Rev. Stat. § 311.725; La. Stat. § 40:1061.10; Mich. Comp. Laws § 333.17015; Minn. Stat. § 145.4242; Miss. Code § 41-41-33; Mo. Stat. § 188.027; Neb. Rev. Stat. § 28-327; N.C. Gen. Stat. § 90-21.82; N.D. Cent. Code § 14-02.1-02; Ohio Rev. Code § 2317.56; Okla. Stat. tit. 63, § 1-738.2; 18 Pa. Stat. and Cons. Stat. § 3205; S.C. Code § 44-41-330; S.D. Codified Laws § 34-23A-10.1; Tenn. Code § 39-15-202; Tex. Health & Safety Code § 171.012; Utah Code § 76-7-305; Va. Code § 18.2-76; W. Va. Code § 16-2I-2; Wis. Stat. § 253.10.

consent for abortion procedures—even information designed to encourage the woman to carry the pregnancy to term—are constitutional. 505 U.S. 833, 884 (1992) (plurality op.). In this context, a State has dual sufficient interests: protecting the health of the patient as well as protecting unborn life. *Id.* at 882-84. These interests create a compelling state interest that outweighs any First Amendment interest of the physician in that context.

By contrast, California's law applies outside the context of obtaining a patient's informed consent for an abortion procedure. This law requires medical facilities to give non-medical information unrelated to services they provide, diminishing the importance of any state interest in comparison to the First Amendment rights of those compelled to speak the State's message.

Amici are also well positioned to explain that States have a host of alternative means available to disseminate the information that the California law requires certain licensed medical facilities to provide, as well as the regulatory authority to address any actual instances of misrepresentation.

SUMMARY OF ARGUMENT

The Ninth Circuit erred by equating California's law with other state laws requiring doctors to obtain informed consent from a patient before performing an abortion procedure. *Casey* did not uphold all laws connected to an "abortion-related disclosure," as the Ninth Circuit termed both California's law and other States' informed-consent laws. Rather, *Casey* approved laws that regulate how a doctor must obtain a patient's informed consent before performing an abortion procedure. In other words, state laws that require a doctor to give a patient information to assess the risks and consequences of an abortion procedure that the doctor will soon perform are valid under *Casey*.

The informed-consent law at issue in *Casey* is significantly different than California's law here. California's law requires licensed medical facilities—including those that do not perform abortions or prescribe all forms of contraception—to nevertheless notify individuals about state-subsidized contraceptives and abortion offered by *other* doctors and facilities. California's law thus has nothing to do with giving a patient information to assess the risks and consequences of a procedure a doctor in a certain medical facility is about to perform. Given this crucial distinction, the constitutional analysis for these laws is different.

I. Informed consent is a specific part of the physician-patient relationship where the State's interest in regulation is compelling. If informed consent is lacking, the physician may be legally liable. The State's interests in public health, regulating the medical profession, and protecting patient autonomy justify regulation of the informed-consent process, and many States do just that.

A majority of States also regulate informed consent in the context of abortion. Aside from the fact that it is permissible for States to regulate informed consent generally, *Casey* upheld informed-consent requirements for abortion in particular. *Casey* approved such requirements, even when they included information not strictly related to the procedure, because of the unique nature of the decision to have an abortion and its consequences.

Casey also permits States to require that information be given during the informed-consent process expressing a State's preference for childbirth. This is because of the other strong state interest supporting informed-consent regulations for abortion: a State's recognized interest in protecting unborn life.

II. In contrast, California's law requiring licensed medical clinics that do not perform abortions or offer contraception to post information about state-subsidized contraception and abortion cannot be justified by the dual state interests supporting regulation of informed consent for abortion. California's law does not relate to informed consent for abortion because it applies to medical facilities where abortions are not performed. It also does not further the State's interest in protecting unborn life; rather, giving information as to where one might obtain a subsidized abortion has the opposite effect. Thus, California's law is not similar to abortion-informed-consent laws upheld in *Casey*, and the Ninth Circuit erred in treating it as such. Moreover, California has other means available to achieve its goals of preventing medical clinics from giving misleading information to patients and making women aware of state-subsidized alternatives.

ARGUMENT

I. *Casey* Held that Informed Consent for Abortion Is a Context Where States May Constitutionally Require Physicians to Give Certain Information to Patients.

A. It is well established that States may regulate professional conduct, even when it involves speech.

The authority of States to regulate professional conduct, including that of the medical profession, is well established. *E.g.*, *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). "States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

A particular area of medical practice that is heavily regulated by States without running afoul of the First Amendment is informed consent:

> The doctor-patient relationship has long been conducted within the constraints of informed consent to the risks of medical procedures, as demanded by the common law, legislation, and professional norms. The doctrine itself rests on settled principles of personal autonomy, protected by a reticulated pattern of tort law, overlaid by both self- and state-imposed regulation. Speech incident to securing informed consent submits to the long history of this regulatory pattern.

Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 585 (5th Cir. 2012) (Higginbotham, J., concurring).

Regardless of the level of scrutiny applied, the State's interest in protecting public health and the patient's ability to assess a procedure's risks and consequences is sufficient in the context of informed consent to justify government regulation.

B. Informed consent is a specific aspect of medical practice where physician discretion is routinely limited by law.

While informed consent is a routine part of contemporary medical practice and ethics, it is fundamentally a legal requirement. Before the early 1900s, treatment was often left to the discretion of physicians with little involvement of the patient. Eventually, the courts began to recognize that a patient should be able to assess a procedure's risks and consequences, and that failing to obtain a patient's consent for a medical procedure should result in legal liability. *E.g.*, *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.); *Pratt v. Davis*, 79 N.E. 562 (Ill. 1906); *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905).

Because a physician who fails to properly obtain informed consent before performing a medical procedure is legally liable, States routinely set legal requirements for informed consent. Many States require a doctor to provide certain information to patients before performing medical procedures.[3] *See, e.g.*, Del. Code tit. 18,

[3] The federal government also regulates informed consent in various contexts. *See, e.g.*, 38 C.F.R. § 17.32 (informed consent requirements in veterans' health facilities); 21 C.F.R. § 50.25 (informed consent requirements in human subject research).

§ 6852; Ga. Code § 31-9-6.1; Haw. Rev. Stat. § 671-3; La. Stat. § 40:1157.1; Minn. Stat. § 144.651; N.Y. Pub. Health Law § 2805-d; N.C. Gen. Stat. § 90-21.13; Ohio Rev. Code § 2317.54; Tex. Civ. Prac. & Rem. Code §§ 74.103, 74.105; Vt. Stat. tit. 12, § 1909; Wash. Rev. Code § 7.70.050; Cal. Code Regs. tit. 22, § 70707(b)(4), (5); Wis. Admin. Code DHS § 94.03.

Some States regulate informed consent requirements for participation in experimental treatments or clinical trials. *See, e.g.*, Cal. Health & Safety Code § 24173 (informed consent for experimental treatment requires explanation of risks, benefits, ability to withdraw, source of funding, and material stake of the investigator in the outcome, among other items); Ind. Code § 25-22.5-1-2.1 (experimental treatment requires informed consent and that a physician "personally examine[]" the patient); 55 Pa. Code § 5100.54 (research must be conducted in compliance with federal regulations on human subjects and a copy of the regulations must be made available to patients); N.D. Admin. Code 33-07-01.1-36 (experimental psychiatric treatment requires hospital to make available federal regulations regarding human subject protection).

Some States also regulate informed consent for particular treatments and procedures. *See, e.g.*, Ala. Code § 22-13-70 (breast cancer treatment); Fla. Stat. § 458.324 (breast cancer treatment); Haw. Rev. Stat. § 671-3(c) (mastectomy); Md. Code, Health-Gen. § 20-114 (breast implants); *id.* § 20-113 (breast cancer treatment); La. Stat. § 40:1103.4 (same); Me. Stat. tit. 24, § 2905-A (same); Mich. Comp. Laws § 333.17013 (same); Mont. Code § 37-3-333 (same); N.Y. Pub. Health Law § 2404 (same); Tex. Civ. Prac. & Rem. Code § 74.107 (hysterectomy); Cal. Code Regs. tit. 22, §§ 70707.1, 70707.3 (sterilization).

Beyond establishing the content of the information a doctor must provide, States regulate other aspects of informed consent. Some specify when consent expires and who may give consent. *See, e.g.*, Cal. Health & Safety Code § 24178(c) (surrogate informed consent can be obtained from persons unable to consent and who do not express dissent or resist); Or. Rev. Stat. § 421.085(2) (inmates are not permitted to participate in medical or psychiatric research); 14-472 Me. Code R. ch. 1, Pt. A § XI.H.3 (individuals between 12 and 18 must give informed consent, if able, to experimental mental health research); 10A N.C. Admin. Code § 28A.0306(b)(3) (informed consent for research subjects may not exceed six months); 25 Tex. Admin. Code § 404.153(9)(F) (informed consent to mental health treatment can be withdrawn by non-compliance or resistance); Wis. Admin. Code DHS § 94.03(1)(f) (informed consent for certain conditions may not exceed 15 months).

In short, the process of informed consent for medical procedures is highly regulated. It is a context where legal liability and the State's interest in public health provide a compelling governmental interest in regulating the medical profession, and this outweighs physician discretion in this context. Thus, informed consent is an area the States may regulate—even down to precise things physicians must tell patients before performing particular procedures—without violating the First Amendment.

C. The dual state interests—in protecting patient health as well as unborn life—implicated in the specific context of an abortion procedure make it distinct from other medical procedures.

1. At a minimum, abortion may be regulated to the same extent as other medical procedures:

> Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position . . . . On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality op.).[4] Just as some States have chosen to require specific information to obtain informed consent for breast-cancer treatment and hysterectomy, a majority of States have decided to regulate the informed-consent process for abortion. *See supra* p.1 n.2.

2. But abortion is unlike other medical procedures in ways that support an even stronger basis for state regulation of informed consent: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a po-

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[4] All citations to *Casey* in this brief are to the controlling joint plurality opinion.

tential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). As *Casey* explained:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

505 U.S. at 852.

The Court has repeatedly recognized the gravity of the abortion decision and the State's interest in ensuring it is fully informed: "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976). "Whether to have an abortion requires a difficult and painful moral decision .... It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed." *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (internal citation omitted).

Thus, this Court has affirmed a State's ability to regulate the informed-consent process to ensure that patients can adequately assess the risks and consequences of the abortion procedure—rejecting First Amendment challenges to these laws. *Id.* at 159-60; *Casey*, 505 U.S. at 882-85; *see also Danforth*, 428 U.S. at 67. As *Casey* held: "To be sure, the physician's First

Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." 505 U.S. at 884 (internal citations omitted).

Informed-consent laws in the context of abortion would satisfy any level of scrutiny given the gravity of the state interests involved. While the physician's First Amendment interests may be the same no matter what medical procedure is at issue, in the context of abortion, the State's interest in regulating the consent process is even more pronounced. Not only does the State have a strong interest in protecting public health, but as this Court has recognized, the State also has a distinct interest in "protecting the life of the fetus that may become a child." *Gonzales*, 550 U.S. at 146; *see Casey*, 505 U.S. at 846; *Roe v. Wade*, 410 U.S. 113, 162 (1973) ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and [] it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct.").

3. The distinct state interest in protecting unborn life alone justifies government regulation regarding informed consent for abortion—including government regulation that would not necessarily be required for informed consent of other medical procedures: "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 157. The unique implications of the abortion procedure have also been acknowledged by this Court as a basis for permitting the State to regulate abortion in ways that express its preference for childbirth. *See Harris*, 448 U.S. at 324 (upholding

the Hyde Amendment); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding the exclusion of abortion from Medicaid because the government may "make a value judgment favoring childbirth over abortion").

The recognized state interest in protecting fetal life coupled with the already strong state interest in public health creates a uniquely compelling interest that outweighs any potential First Amendment interests in this specific context unless the information compelled is false or misleading. *Casey*, 505 U.S. at 882.

In fact, *Casey* specifically upheld abortion-informed-consent requirements regarding information about fetal development and adoption, despite arguments that this information has no direct relation to the woman's health:

> We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health . . . . [I]nformed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant . . . . In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.

Id. at 882-83.

A State can use its regulatory authority to require information about fetal development to be shown to a patient precisely because of the State's interest in pro-

tecting unborn life. Informed-consent laws that include information regarding fetal development also provide significant information about the consequences of the abortion procedure.

* * *

State regulation of the informed-consent process for abortion is justified by the combined state interests of protecting public health and unborn life. Informed consent involves a physician giving information to a patient about the risks and consequences of undergoing a particular procedure. The risks and consequences unique to abortion procedures may be part of informed-consent requirements without violating the First Amendment, even if that information expresses a State's interest in encouraging childbirth.

II. California's Licensed-Clinic Requirements in the "Reproductive FACT Act" Differ in Important Ways from Laws Regulating the Informed Consent a Doctor Must Obtain from a Patient Before Performing an Abortion.

A. The California law at issue in this case differs significantly from other States' abortion-informed-consent laws. Among other things, the California law at issue requires licensed medical facilities that provide prenatal care or family planning services to provide a notice to all clients stating that California has programs providing free or low-cost access to other family planning services, explicitly including abortion, and listing a phone number for the county social services office. Pet. App. 80a; Cal. Health & Safety Code §§ 123471(a), 123472(a). The Ninth Circuit pretended that California's law was the legal equivalent of other States' abortion-informed-consent laws by incorrectly labeling in-

formed-consent laws at a higher level of generality—"abortion-related disclosure." *NIFLA v. Harris*, 839 F.3d 823, 837-38 (9th Cir. 2016).

But not all "abortion-related disclosure" laws involve informed consent. Informed consent is required specifically so that the patient can assess the risks and consequences of a procedure that a doctor is seeking to perform. Mandating provision of information by a doctor seeking to perform such a procedure is at the core of informed-consent requirements. In contrast, a State's desire to compel clinics to disseminate information about the availability of state funding for procedures those clinics do not perform has nothing to do with allowing a patient to assess the risks and consequences of a medical procedure about to be performed.

Additionally, abortion procedures differ markedly from the services offered by Petitioners—pregnancy tests, ultrasounds, referrals, and health care consultations, Pet. App. 91a-92a, 93a—which involve little, if any, risk. California's notice requirement does not function to make patients aware of the risks or consequences of these medical services.

Thus, as demonstrated by both the nature of the services provided and the information required to be disclosed, the California law at issue is not an informed-consent law like the law in *Casey*. California is compelling medical clinics to disseminate information about state-subsidized procedures the clinics do not provide—rather than regulating the information about the procedure a patient is about to obtain from a doctor.

B. Moreover, there are a host of alternative means available for California to further its asserted interest in disseminating information about its state-subsidy program without compelling private speech.

Namely, California itself could engage in government speech to promote its own state program. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (State can publish financial information of charitable entities and enforce antifraud laws, rather than compelling speech from fundraisers); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (State could promote temperance through taxation, regulation, and education, rather than banning certain speech); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 97 (1977) (Township could promote integrated housing through an educational process and inducements to homeowners, rather than banning certain speech).

California has not hesitated to spend millions on public awareness campaigns on everything from e-cigarettes[5] and eating more fruits and vegetables,[6] to fighting stigma against mental illness[7] and conserving

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[5] *See* Alexandra Sifferlin, *California Launches Campaign Against E-Cigarettes*, Time (Mar. 23, 2015), http://time.com/3754051/california-e-cigarette-ads/ [https://perma.cc/4TGE-2EEB].

[6] *See* Foerster SB, et al., *California's "5 a day—for better health!" campaign: an innovative population-based effort to effect large-scale dietary change*, Am. J. Prev. Med. 1995 Mar.-Apr.; 11(2): 124-31, abstract available at https://www.ncbi.nlm.nih.gov/pubmed/7632448 (last accessed Jan. 15, 2018).

[7] *See* Rand Corp., *California Mental Health Stigma-Reduction Campaign Creates Economic Benefits for the State*, Apr. 14, 2016, https://www.rand.org/news/press/2016/04/14/index1.html [https://perma.cc/56ZH-VHST].

water.[8] California's campaign on driving safely through work zones even won an award.[9] Raising awareness about subsidized health services may be accomplished just as easily as raising awareness about avoiding sugary beverages[10] without using unwilling clinics as a conduit.

California separately claims an interest in preventing "misinform[ation]" from being given by medical clinics that do not perform abortions. Pet. App. 7a. But those clinics are already regulated by the State through licensing. Pet. App. 91a; Cal. Health & Safety Code §§ 1204, 1225-45. Licensed clinics are required to adhere to state-mandated standards. Cal. Health & Safety Code § 1240. If there is evidence of wrongdoing on behalf of any of the medical clinics, California may unquestionably enforce those standards through the power of its regulatory authority, like any other State. But enforcing standards does not necessitate a blanket requirement compelling medical clinics to advertise state-subsidized services they do not provide.

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[8] *See* Cal. Dep't of Water Res., *About Save Our Water*, http://saveourwater.com/about-save-our-water/ [https://perma.cc/K6GB-NXKY].

[9] *See* Jon Ortiz, *Caltrans $6 million public-awareness campaign wins national award*, Sacramento Bee, Oct. 14, 2015, http://www.sacbee.com/news/politics-government/the-state-worker/article39181968.html [available at https://perma.cc/UV6C-D7GX (screenshot view)].

[10] *See* Cal. Dep't of Pub. Health, *Rethink Your Drink*, https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/NEOPB/Pages/RethinkYourDrink.aspx [https://perma.cc/9D3E-LRJ4].

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

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